

REPUBLIC OF KENYA



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THE SENATE

TWELFTH PARLIAMENT  
SECOND SESSION

Approved  
13/06/2018

THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND  
HUMAN RIGHTS

A REPORT ON THE OFFICE OF THE COUNTY ATTORNEY BILL  
(SEN. BILL NO. 3 OF 2018)

Hon. speaker

You may approve.

13/6/18

Clerk's Chambers,  
First Floor,  
Parliament Buildings,  
NAIROBI.

June, 2018

## PREFACE

### Establishment of the Committee

The Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to the Senate Standing Order 212 and mandated to consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.

### Membership of the Committee

The Committee is comprised of the following members:-

1. Sen. Samson Cherarkey, MP - Chairperson
2. Sen. Mithika Linturi, MP - Vice-Chairperson
3. Sen. James Orenge, MP
4. Sen. Fatuma Dullo, MP
5. Sen. Amos Sitswila Wako, MP
6. Sen. Kilonzo Mutula Jnr., MP
7. Sen. Susan Wakarura Kihika, MP
8. Sen. Irungu Kang'ata, MP
9. Sen. Faki Mohamed, MP

Mr. Speaker,

The Office of the County Attorney Bill, 2018 seeks to establish the Office of the County Attorney. The County Attorney would be the principal legal adviser to the county executive and would be responsible for representing the county executive in any legal proceedings. The Bill also provides for the functions and powers of the County Attorney and the appointment of a County Solicitor and County Legal Counsel. The Committee noted that the Bill will address current challenges with regard to the quality of county legislation and the high cost of litigation by counties arising from dispute resolution.

**1.2.1 Part II-Establishment and Administration**

Clause 4 establishes in each county the Office of the County Attorney as an office in the county public service that shall consist of the County Attorney, the County Solicitor and any other number of County Legal Counsel as the County Attorney may in consultation with the County Public Service Board may consider necessary.

Clause 5 provides for the procedure for appointment and the qualifications for appointment expected of a person seeking the Office of the County Attorney. Clause 5 (2) provides that the persons should have at least seven years experience as an Advocate of the High Court of Kenya; and meet the requirements of Chapter Six of the Constitution.

Clause 6 sets out the functions of the County Attorney while Clause 7 sets out the powers which includes appearing at any stage of any proceedings before any courts or tribunal, requiring any officer in the county public service to furnish the Office with information, summoning officers within the county public service and issuing of directions to officers within the county public service.

Clause 8 provides for the right of audience for the County Attorney on matters of public interest while clause 9 protects the County Attorney, the County Solicitor, County Legal Counsel or any other officer in the Office from personal liability.

Clause 10 provides that the County Attorney shall have the status and rank of a County Executive Committee member.

Clause 11 prohibits the County Attorney, the County Solicitor and the County Legal Counsel from any other gainful employment that may result in a conflict of interest.

Clause 12 provides the procedure for resignation which Clause 13 provides for the procedure and grounds for the removal from Office which shall be in writing to the Governor.

The Bill will fill a gap in the counties with regard to access and provision to legal services. It is expected that as a consequence of having the Office of the County Attorney, counties will be improve the quality of legislation and provide legal advice and representation that would reduce

**1.3 Consequences of the Bill**

Second Schedule- Code of Conduct

First schedule- Oath of Office for the County Attorney

The Schedules provide as follows-

**1.2.5 Schedules**

Section 31 provides for the Transition for members of staff employed by the county executive.

Clause 31 provides that the Act will prevail in case of inconsistencies with county legislation.

Clause 30 gives the County Attorney the power to make Regulations in line with the Act.

County Attorney.

Clause 27 and Clause 28 provides for the facilities and source of funds for the office of the

Attorney.

Clause 25 provides that the County attorney shall custody of the Seal of the County Executive while clause 26 gives the County Attorney have access to persons, relevant records, documents and property pertaining to civil or criminal cases in the performance of the duties of the County

Clause 24 provides that the Office shall be the depository of all laws and legal documents and agreements signed for or on behalf of the county executive.

Clause 23 prohibits the unauthorized disclosure of information by an officer or member of staff

of the Office.

**1.2.4 Part V – Miscellaneous Provisions**

Executive Committee. Further, that under Clause 6 (g) the County Attorney should be obligated to liaise with the Attorney-General.

(3) **Clause 7-Powers of the County Attorney**

The Kenya Law Reform Commission noted that Clause 7 (2) (a) of the Bill should establish administrative units in accordance with the guidelines issued by the County Assemblies Public Service Board so as to align with the county governments Act. The Commission further proposed to include a clause to provide that the County attorney should not be under the direction of control of any other person.

(4) **Clause 10- Status of the Office of the County Attorney**

The National Gender and Equality Commission submitted that the County Attorney should be at the status of a High Court Judge and shall be remunerated as such. The Commission noted that office comes with a lot of responsibilities that demands the holder should be remunerated well to avoid the temptation of corruption. Further, they were of the view that the position of County Executive Committee is junior and does not resonate with the responsibilities of a County Attorney pointing out the Salaries and Remuneration commission ranks the position of the County Executive Committee at band C, Grade D with a total possible pay of Kshs. 182, 000 which is not commensurate to the Office.

The Kenya Law Reform Commission was of the opinion that the Bill should a new provision to designate the County Attorney as State Office in accordance with Article 260 of the Constitution. The Commission noted that the Office cannot purport to have the status of another state office unless it is designated as such by statute.

(5) **Clause 11-Private Practice Prohibited**

The National Gender and Equality Commission proposed that the Clause be amended to include a non-practicing allowance to be proposed by the Law Society of Kenya and determined by the Chief Justice in consultation with the Salaries and Remuneration commission. The Commission was of the view that when you take away the right to practice, there is need to compensate for the loss by giving commensurate allowance.

The Kenya Law Reform Commission further proposed that the Code set out under Clause 20 (1) at the Second Schedule be deleted because it deal with the same matters published under the Leadership and Integrity Act. Further, the Commission was on the view that Clause 20 (2) should be deleted because it delegates unrestrained legislative power to the County Attorney to amend the Schedule. The import of the Clause in that forty seven (47) County Attorneys will be able to amend the Schedule by notice in the *Gazette*. There are no procedural safeguard such as approval by Parliament to check this delegated authority.

The Law Society of Kenya and the Kenya Law Reform Commission proposed that the Code of Conduct should be applicable to the persons in the Office of the County Attorney, that is the County Attorney, the County Solicitor and the County Legal Counsel. There should be uniform application of the law.

***(12) Clause 20- Code of Conduct***

The Law Society of Kenya proposed that the determination and remuneration of County Attorney and County Solicitor should be expressly provided for just as was done for County Legal Counsel in Clause 19. Failure to provide for determination of remuneration for County Attorney and County Solicitor negates the doctrine for equal pay for equal job done.

***(11) Clause 19- Terms and Conditions of Service***

The Law Society of Kenya proposed that upon request and recommendation by the County Attorney, the County Public Service Board shall appoint such County Legal Counsel(s) as shall be necessary for the proper and discharge of the functions of the office. The provision on Clause 18, do not take into account the diversity of legal work carried out in the office of the County Attorney and the complexity of matters or volume of work within the office. The involvement of the County Attorney in recruitment of legal counsel is paramount in addressing this problem.

***(10) Clause 18-County Legal Counsel***

The Council of Governors proposed the County Solicitor and legal counsel to have minimum experiences of 3 years.  
The person supervising the county solicitor and the County Attorney needs to be consulted in the recruitment process.

(c) meets the requirements of Chapter Six of the Constitution.

With regard to the term of Office of the County Attorney, the Committee further recommends the insertion of a NEW CLAUSE 5A to provide for the Tenure of Office of the County Attorney as six years as follows-

Tenure of office.

5A. The County Attorney shall hold office for a term of six years unless the County Attorney resigns in writing or is otherwise removed under this Act.

## **(2) Clause 6- Functions of the County Attorney**

Clause 6 sets out the functions of the County Attorney

### **Observation(s)**

The Committee observed that Clause 6(a) limits the functions of the County Attorney to the executive arm of the county government. The Committee noted that the County Attorney will be the principle legal advisor of the county government and should serve both the executive and county assembly.

The Committee further noted that Clause 6 (c) should also be amended to ensure that there is clarity that the County Attorney shall represent the county government and that both the executive and the legislative arms of governments may give legal instructions to the County Attorney.

### **Recommendation(s)**

The Committee therefore recommends that –

Clause 6 (a) be amended to deleting the words ‘executive committee’ and substituting with the word ‘government’ to reflect that the County Attorney will serve the county government which constitutes the county executive as well as the county assembly.

Clause 6 (c) be amended to reflect that the County Attorney serves the county government and not just the executive arm.

writing to the Governor.

Clause 13 provides for the procedure and grounds for the removal from Office which shall be in  
**(9) Clause 13: Removal from Office**

The Committee recommends that clause 12 of the Bill be retained as it is.  
**Recommendation(s)**

Clause 12 provides the procedure for resignation of the County Attorney.  
**(8) Clause 12: Resignation**

The Committee recommends that clause 11 of the Bill be retained as it is.  
**Recommendation(s)**

Clause 11 prohibits the County Attorney, the County Solicitor and the County Legal Counsel from any other gainful employment that may result in a conflict of interest.  
**(7) Clause 11: Private Practice Prohibited**

The Committee therefore recommends that Clause 10 be deleted.  
**Recommendation(s)**

The Committee noted that stakeholders had various points of view with regard to the status of Office of the County Attorney including that the post of County Executive Committee does not resonate with the responsibilities of the County Attorney. The Committee noted that it was necessary to ensure that the Office of the County Attorney fits into the existing structure of the county government.

**Observation(s)**

Executive Committee member.

Clause 10 provides that the County Attorney shall have the status and rank of a County  
**(6) Clause 10: Status of the Office of the County Attorney**





**Observation(s)**

The Committee observed that the determination and remuneration of County Attorney and County Solicitor should be expressly provided for just as was done for County Legal Counsel in Clause 19.

**Recommendation(s)**

The Committee therefore recommends that Clause 19 of the Bill be amended by inserting the words “County Attorney, County Solicitor and” immediately before the words “County Legal Counsel”.

**(17) Clause 20-Code of Conduct**

Clause 20 requires the County Legal Counsel to observe the Code of Conduct set out in in the Second Schedule.

**Observation(s)**

The Committee observed that the Code of Conduct should be applicable to the persons in the Office of the County Attorney, that is, the County Attorney, the County Solicitor and the County Legal Counsel. There should be uniform application of the law.

**Recommendation(s)**

The Committee therefore recommends that Clause 20 (1) be amended by inserting the words “County Attorney, County Solicitor” immediately before the words “County Legal Counsel to ensure that there is uniform application of the law.

**(18) Clause 21- Secondment**

Clause 21 sets out the terms for Secondment of County Legal Counsel.

**Recommendation(s)**

The Committee recommends that Clause 21 of the Bill be retained as it is.

**(19) Clause 22- Staff**

Clause 22 provides for the Staff of the Office of the County Attorney.

(28) Clause 2- Interpretation  
Clause 2 provides for interpretation of terms.

Recommendation(s)

The Committee observed that since the power to make Regulations under the Act had been assigned to the Cabinet Secretary, Clause 2 is amended by inserting the definition of the Cabinet Secretary as follows -

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to justice and legal affairs.

(29) Schedules

The Schedules provide as follows-

First schedule- Oath of Office for the County Attorney

Second Schedule- Code of Conduct

Recommendation(s)

The Committee recommends that the First Schedule to the Bill be retained as it is.

The Committee recommends that the Second Schedule to the Bill be retained as it is.

# I: MINUTES

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**REPUBLIC OF KENYA**



**TWELFTH PARLIAMENT  
THE SENATE**

**PUBLIC HEARINGS/ RECEIPT OF MEMORANDA**

**The Office of the County Attorney Bill, (Senate Bills No. 3 of 2018)  
and the Public Participation Bill (Senate Bills No. 4 of 2018)**

The Office of the County Attorney Bill (Senate Bills No. 3 of 2018) and the Public Participation Bill (Senate Bills No. 4 of 2018) was read a First Time in the Senate on 27<sup>th</sup> March, 2018 and 29<sup>th</sup> March, 2018, respectively, and thereafter stood committed to the Senate Standing Committee on Justice, Legal Affairs and Human Rights.

Pursuant to the provisions of Article 118 and standing order 134 (5) of the Standing Orders of the Senate, the Standing Committee on Justice, Legal Affairs and Human Rights now invites interested members of the public to submit any representation that they may have on the Office of the County Attorney Bill (Senate Bills No. 3 of 2018) and the Public Participation Bill (Senate Bills No. 4 of 2018). The representations may be made orally or by submission of written memoranda in the following manner –

1. Public Hearings shall be held on **Wednesday, 9<sup>th</sup> May, 2018 from 10:00 a.m. to 1.00 pm at the Mini Chamber, First Floor, County Hall, Parliament Buildings, Nairobi;** or
2. Written Memoranda may be forwarded to the **Clerk of the Senate, Secretary, Parliamentary Service Commission, P.O. Box 41842-0010 Nairobi,** hand-delivered to the **Office of the Clerk, First Floor, Parliament Buildings, Nairobi** or emailed to [cSenate@parliament.go.ke](mailto:cSenate@parliament.go.ke) to be received on or before **Friday, 4<sup>th</sup> May, 2018 at 1:00 pm.**

The Office of the County Attorney Bills (Senate Bills No. 3 of 2018) and the Public Participation Bill (Senate Bills No. 4 of 2018) may be found on the Parliament website at <http://www.parliament.go.ke/senate>.

**CLERK OF THE SENATE/ SECRETARY  
PARLIAMENTARY SERVICE COMMISSION.**

*[Handwritten signature]*

	<p>The spirit of fairness and inclusion of public participation in the removal of the County Attorney as envisioned by article <b>251</b> of the constitution 2010.</p> <p>Secondly, <b>there is a possibility of conflict</b> between the governor and county assemblies in view of his mandate</p>
	<p>We propose that the clause be deleted and replaced with a new clause as follows:</p> <p>(1) A person desiring the removal of County Attorney may present a petition to the county Assembly setting out the alleged facts constituting that ground.</p> <p>(2) The county Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the governor</p> <p>(3) On receiving a petition under clause (2), The governor —</p> <p>(a) may suspend the member or office holder pending the outcome of the complaint; and</p> <p>(b) shall instruct the <b>county public service</b> board to form a tribunal</p> <p>(4) The tribunal shall consist of—</p> <p>(a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;</p> <p>(b) at least two persons who are qualified to be appointed as High Court judges; and</p> <p>(c) one other member who is qualified to assess the</p>
<p>that may result in a conflict of interest.</p>	<p>13(1) The Governor may with the approval of the County Assembly, remove the County Attorney from office only for— (a) serious violation of the Constitution or any other law; (b) gross misconduct, whether in the performance of functions of the Office of the County Attorney or otherwise; (c) physical or mental incapacity to perform the functions of office; (d) incompetence; or (e) bankruptcy.</p>

	<p>(c) shall represent the county executive in court or in any other legal proceedings to which the county executive is a party, other than criminal proceedings</p> <p>(d) shall advise departments in the county executive on legislative and <u>other legal matters</u></p> <p>(f). shall be responsible for the revision of county laws;</p>	<p>(c) shall represent the <b>county Governments</b> in court or in any other legal proceedings to which the <b>county Government</b> is a party, other than criminal proceedings</p> <p>(d) shall advise departments in the <b>County Government</b> on legislative and other legal matters</p> <p>Amend to read:  (f) <i>Drafting legislative proposals for the County Government and advising the County Government and its agencies on legislation and <u>other legal matters</u></i></p>	<p>Committee only. The County Attorney should be in a position to give legal advice to all the departments at the County.</p> <p>Under the Fourth Schedule of the Constitution, County Governments have 14 devolved functions. These functions need County Specific legislation to regulate. As such, the office of the County Attorney should be given the mandate to draft legislative proposals as the Attorney General does for the National Government.</p>
<p><b>Clause 9: Protection from personal liability</b></p>	<p>9. No criminal proceeding or civil suit shall be brought against the County Attorney, the County Solicitor, County Legal Counsel or any other officer in the Office in respect of any proceedings in a court of law or in the course of discharging of the functions of the County Attorney under this Act.</p>	<p>Amend the clause 9 by introducing a new sub-clause 9(2) to read as follows:</p> <p><i>9 (2). No matter or thing done by the County Attorney, the County Solicitor County Legal Counselor any other Officer in the Office shall, if the matter or thing is done in <u>good faith</u> for executing the functions, powers or duties of the Office, render the County Attorney, County Solicitor, County Legal Counselor any other officer in the Office personally liable to any action, claim or demand whatsoever.</i></p>	<p>This is to protect matters or things done in good faith while discharging the mandates under the Bill by the County Attorney and other officers within the office.</p>
<p><b>Clause 13: Removal from office</b></p>	<p>13(2) Notwithstanding any other provisions of this Act, the Governor may, upon election under the Constitution, appoint a person who is qualified as County Attorney in</p>	<p>Amend the clause 13(2) by deleting it and replacing with the following:</p> <p><i>13(2) Notwithstanding any other provisions of this Act, when a general election is held</i></p>	<p>Since the County Attorney is appointed by the Governor, it is only fair that the term of office of the Attorney is tied to the term of the Governor as in the case of County</p>

In the performance of its mandate, the Law Society of Kenya circulates Bills, legislation and Regulations made pursuant thereto to its members for comments, collates those comments before engaging with relevant arms of government and other stakeholders. The Law Society of Kenya has prepared observation on the Office of the County Attorney Bill (Senate Bill No 3 of 2018), that is before the Standing Committee on Justice Legal Affairs and Human Rights.

Allen Waiyaki Gichuhi (President), Harriette Chiggai (Vice-President)  
Herine Akoth, Maria Mbeneka, Roseline Odhiambo (General Membership Representatives)  
Boniface Akusala, Carolyn Kamende, Aileen Ingati, (Nairobi Representatives)  
Damaris Ndira, Bernhard Kipkooch, David Njoroge, Jane Masai, (Upcountry Representatives)  
Eric Watula (Coast Representative)



				Solicitor who shall be competitively recruited and appointed by the Public Service Board in consultation with the County Attorney.
5. County Legal Counsel	Section 18 (1) Appointment	The provisions of Section 18 (1) do not take into account the diversity of legal work carried out in the office of the County Attorney and the complexity of matters or volume of work within the office.	1. The involvement of the County Attorney in recruitment of legal Counsel is paramount in addressing this problem.  Therefore Section 18 (1) should be amended to read as follows:  Upon request and recommendation by the County Attorney, the County Public Service Board shall appoint such County Legal Counsel(s) as shall be necessary for the proper and efficient discharge of the functions of the office.	

Allen Waiyaki Gichuhi (President), Harriette Chiggai (Vice-President)  
 Herine Akoth, Maria Mbencka, Roseline Odhiambo (General Membership Representatives)  
 Boniface Akusala, Carolyn Kamende, Aileen Ingati, (Nairobi Representatives)  
 Njoroge, Jane Masai, (Upcountry Representatives)  
 Eric Wafula (Coast Representative)

Damaris Ndinda, Bernhard Kipkoech, David

Section 115 on part provides the following:

115(1) Public participation in the county planning process shall be mandatory and be facilitated through-

a. Mechanism provided for in part VIII of this Act; and  
 b. Provision to the public of clear and unambiguous information of any matter under consideration in the planning process , including -

- i. Clear strategic environmental assessment;
- ii. Clear environmental impact assessment reports;
- iii. expected development outcomes ; and
- iv. development options and their cost implications.

(2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and

Section 92(2) requires the governor to submit an annual report to the county assembly on citizen participation in the affairs of the county government.

Section 91 states that the county government shall facilitate the establishment of structures for citizen participation including-

- a. Information technology based platforms;
- b. Town hall meetings;
- c. Budget preparation and validation fora;
- d. Notice boards, announcing jobs, appointments , procurements, awards and other important announcements of public interest;
- e. Development project sites ;
- f. Avenues for the participation of people's representatives including but not limited to members of the national assembly and senate ; or
- g. Establishment of citizen fora at county and decentralized units.

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- e. Development project sites ;
- f. Avenues for the participation of people's representatives including but not limited to members of the national assembly and senate ; or
- g. Establishment of citizen fora at county and decentralized units.

Treasury to take into account the views of the public in preparing the County Fiscal Strategy Paper.

## 6. The Standing Orders

The Standing Orders regulate the legislative process and procedures. In light of the Constitution of Kenya, 2010, particularly on the requirement for County Assemblies to facilitate public participation in the legislative process and at committees; **County Assemblies incorporated public participation as a legislative step.**

**The Standing Orders also have provisions for public petitions to the county assemblies which is a tool of public participation in the decision-making process**

## 7. Judicial Pronouncements

The judiciary has from time to time, enforced the requirement for public participation in public decision making and such pronouncements have enriched the jurisprudence on public participation including on procedural requirements for an effective public participation.

- **The bill, if enacted in its current form, shall be in conflict with other prevailing laws.**

As already discussed, there already exist other legislations particularly the County Government Act of 2012, which make substantial provisions for matters on public participation particularly by the county governments. But the bill can intervene in defining the roles of the Executive and Legislatures in the various areas where public participation is required to avoid repetition and unnecessary public expenditure.

The legislation will also do good to define the reach and content threshold in public participation as in the current the same is merely a ritual.

- **The new law, when enacted, must strategically respond to the challenges the county governments are experiencing in matters of public participation, particularly the challenge of public apathy to the process.**

One of the challenges being experienced by county governments in matters of public participation, particularly in the context of budget and law making processes, is public apathy signed off by the low turn outs in citizen fora. This challenge is worsened by the fact that a lot of resources are committed to facilitate such fora.

EXPLANATION	PROPOSAL	NO. SECTION	NO. SECTION
<p>This will ensure that the County Attorney will not get too many staff employed; It is a measure to check on the wage bill</p>	<p>There shall be such officers and other members of staff of the office of the County Attorney established in consultation with the County Public Service Board, for the proper and efficient discharge of the functions of the office</p>	4. Section 22	
<p>The monies receipts and expenses should be according to the PFM Act 2017 and not appropriated otherwise</p>	<p>All monies received by the office of the County Attorney should be spent in accordance to the PFM Act 2017</p>	5. Section 28	
<p>This act should not be applied retrospectively</p>	<p>There are loopholes that justify for claims of payments, gratuity as if the current staff have continued to be in office during (under the new terms of this Act)</p>	6. Section 32 (1)	
<p>The County Attorney is the Governor's appointee hence should not be redeployed by the County Public Service Board</p>	<p>This should not apply to the County Attorney but apply only to the County Solicitor and County Legal Counsel</p>	Section 32 (3)	